IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 17, 2003 Session

STATE OF TENNESSEE v. RAFAEL A. BUSH

Appeal from the Circuit Court for Rutherford County
No. F-50300B James K. Clayton, Jr., Judge

No. M2002-02390-CCA-R3-CD - Filed April 14, 2004

A Rutherford County Circuit Court jury convicted the defendant, Rafael A. Bush, of especially aggravated robbery, a Class A felony; aggravated burglary, a Class C felony; and aggravated assault, a Class C felony. The trial court sentenced him as a violent offender to twenty-two years for the robbery conviction, four years for the burglary conviction, and four years for the assault conviction, all to run concurrently. The defendant appeals, claiming that (1) the evidence is insufficient to support his convictions; (2) the trial court erred by allowing the jury to hear about the defendant's other bad acts; (3) the trial court erred by refusing to allow the defense to cross-examine Detective Dan Goodwin about the victim's identifying someone other than the defendant as the person who shot the victim; (4) the trial court erred by allowing the state to ask Detective Goodwin questions on redirect examination that were outside the scope of his cross-examination testimony; (5) the trial court erred by refusing to allow the defense to ask codefendant Michael May a question in order to show his bias against the defendant; (6) the trial court erred by allowing a witness to testify for the state when the witness was not on the state's witness list and her testimony was irrelevant; (7) the trial court erred by telling the jury that the state dismissed an attempted first degree murder charge against the defendant; (8) a new trial is warranted because the state failed to prove that the crimes were committed before the indictment was returned as required by T.C.A. § 39-11-201(a)(4); (9) the trial court erred by refusing to charge attempt as a lesser included offense; (10) the defendant's sentence for especially aggravated robbery is excessive; and (11) cumulative errors denied the defendant his right to a fair trial. We conclude that the trial court erred by allowing the jury to hear about the defendant's other bad acts and by refusing to allow the defense to ask Michael May a question but that these errors do not warrant reversal. We also conclude that the defendant's sentence is not excessive, and we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Terry A. Fann, Murfreesboro, Tennessee, for the appellant, Rafael A. Bush.

Paul G. Summers, Attorney General and Reporter; Helena Walton Yarborough, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Paul A. Holcombe, III, and John W. Price, III, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

This case relates to five men breaking into the home of Pascual Lopez-Blacos ("Mr. Lopez"), demanding money from him, and shooting him in the leg. Mr. Lopez testified that he was from Mexico, that he had been in the United States for six years, and that he was in this country illegally. He said that he met his wife in Tennessee and that they had two young daughters. He said that on the night of July 26, 2000, he was asleep in his bed and that one of his daughters was sleeping beside him. He said that his nephew, Angel Lopez-Moralez, was in a second bedroom and that a friend, Joaquin Martinez-Abacian, was in another room of the house. He said that he heard his bedroom door open and that two men came into the room. He said that one man had a pistol and was wearing pantyhose over his head and that the other man was carrying a shotgun. He said both men were African-American and wore black clothing. He said that the man with the pistol came to the bed and demanded "dinero," that he told the man he did not have any money, and that the man asked for "dinero" again. He said the man hit him on the head with the pistol, cutting his head, and shot him in the leg. He said that the gunshot woke up his daughter and that the man with the shotgun picked her up. He said he told the men he had money in the kitchen and started walking to the kitchen but fell onto the living room couch. He said the man with the shotgun told the man with the pistol that they needed to leave because the police were coming. He said the men left his house.

Mr. Lopez testified that the police arrived and that he went to the hospital. He said he could not walk for three months due to the gunshot wound and acknowledged that he was in a lot of pain for about three and one-half months. He indicated that he had a scar on his leg as a result of the shooting and identified Michael May as the man who carried the shotgun. On cross-examination, he admitted that at the defendant's and Michael May's preliminary hearing, he identified May as the man who shot him with the pistol. He also acknowledged testifying at the hearing that he did not take his eyes off the shooter.

Angel Lopez-Moralez testified that he is Mr. Lopez's nephew and lived with Mr. Lopez at the time of the robbery. He said that when the men came into the house, he was in a second bedroom. He said that he heard someone at his bedroom door, that a man came into his room, and that the man hit him on the head with a pistol. He said the man was wearing black clothes, boots, gloves, and pantyhose over his head. He said that the man wanted "dinero" and that he gave the man his wallet, which contained eighty dollars. He said that the man left his room and that he heard a gunshot. He said that he could hear men talking to his uncle and that after the men left the house, he came out of his bedroom and found his uncle bleeding on the living room couch. He said his uncle had been shot in the leg and was taken to a hospital. He said his brother and sister-in-law also lived with Mr. Lopez but were not home at the time of the robbery. He said that after the robbery, they discovered that a small stereo and a compact disc (CD) were missing from their bedroom. He said that the police found his wallet outside but that the eighty dollars was gone.

Michael E. May, who was indicted with the defendant, testified that it was the defendant's idea to rob Mr. Lopez and that the defendant told him Mr. Lopez was a drug dealer and an illegal alien. He said that on the night of the robbery, he drove the defendant, Delmiccio Tigg, and two Hispanic men to Mr. Lopez's house. He said that he did not wear a mask but that some of the other men wore pantyhose over their heads. He said that he carried the defendant's sawed-off shotgun and that the defendant had a 9mm handgun. He said that the defendant kicked in Mr. Lopez's back door and that everyone went inside the house. He said that the defendant and Tigg went into Mr. Lopez's bedroom and that the two Hispanic men went into another bedroom. He said he followed the defendant and Tigg to Mr. Lopez's bedroom door but then went back outside to the car. He said that while he was outside, he heard a gunshot and returned to the house. He said that the defendant was in the kitchen, that the defendant was pointing a gun at Mr. Lopez, and that Tigg was blocking a little girl from the defendant. He said that the defendant was demanding money but that Mr. Lopez said he did not have any. He said that blood was on the floor and that Mr. Lopez had been shot. He said that he told the defendant to "come on" and that they ran out of the house. He acknowledged talking to the state about his case. He said the state had made no promises in return for his testimony but had told him that it would make favorable recommendations to the trial court if he testified truthfully.

On cross-examination, May testified that he was arrested eight days after the robbery. He said Detective Dan Goodwin interviewed him, and he acknowledged lying to Detective Goodwin during his initial interview, telling the detective that he did not know anything about the crimes. He also acknowledged telling the detective that he did not hear any gunshots during the robbery. He said, though, that he would not lie to the jury. He acknowledged that he was going to plead guilty and that he wanted some leniency from the state and the trial court. He denied that Detective Goodwin told him he would get leniency if he helped convict the defendant. He acknowledged that at a preliminary hearing, Mr. Lopez identified him as the shooter.

Delmiccio Tigg testified that on July 26, 2000, he, the defendant, and Michael May were in the defendant's apartment and talked about robbing Mr. Lopez. He said that it was the defendant's idea to rob Mr. Lopez and that the defendant thought Mr. Lopez would not report the robbery to the police. He said that the three of them and two Hispanic men went to Mr. Lopez's house and that the defendant kicked in the door. He said that he, May, and the defendant wore pantyhose over their heads; that May had the defendant's shotgun; that the defendant had a 9mm pistol; and that one of the Hispanic men also had a 9mm pistol. He said that he and the defendant went into Mr. Lopez's bedroom and that the defendant pointed the pistol at Mr. Lopez. He said that the defendant demanded money but that Mr. Lopez said he did not have any. He said that Mr. Lopez grabbed for the defendant's gun, that the defendant pushed Mr. Lopez away, and that the defendant shot Mr. Lopez in the knee. He said that a little girl was about three to four feet away from Mr. Lopez at the time of the shooting and that he stood between the little girl and the defendant because he did not want her to see what was happening. He said that after the shooting, Michael May came in and pulled the defendant out of the room. He said they all left the home.

Tigg acknowledged knowing a man named Cordell Nelson and said that Nelson was present at the defendant's apartment before the robbery when everyone was talking about robbing Mr. Lopez. He said, though, that Nelson did not participate in the crimes. He said that three or four days after the robbery, he saw Nelson at the defendant's apartment complex. He said that Nelson was sitting in a car, that he ran up to the car and sprayed Nelson with Mace, that he grabbed a bag of drugs off Nelson's lap, and that he ran to the defendant's apartment. He said that when he got to the apartment, he took some of the drugs out of the bag and got into bed. He said that Nelson came to the apartment, took back the bag of drugs, and took the 9mm pistol that the defendant had used on July 26. He said the defendant decided to accuse Nelson of shooting Mr. Lopez because Nelson now had the 9mm pistol. He said that when he was arrested, he told Detective Goodwin that Cordell Nelson participated in the robbery and shot Mr. Lopez. He said that he later told the detective the truth about the defendant's shooting Mr. Lopez. He said that he was charged with the same crimes as the defendant and that the state had not promised him anything in return for his testimony. He said, though, that he expected the state to make favorable recommendations to the trial court. On cross-examination, he said that he had talked to the prosecutor about pleading guilty and that his case had not been set for trial. The state later proved through a deputy court clerk that both May's and Tigg's cases had been set for trial the same date as the defendant's trial.

Lavondis Cordell Nelson testified that he and some other men used to gather in an apartment at the Bell-Aire Apartment complex. He said that on the day of the robbery, the defendant, May, and Tigg were in the apartment and said they had to go somewhere. He said that they did not tell him where they were going but that they were wearing dark clothing. He said that when they returned, two of them talked about what had happened and that May was carrying a shotgun. He said that a couple of days later, he had an ounce of cocaine in a bag and was sitting in a car in the apartment complex. He said that he was waiting to make a drug sale and that the bag of cocaine was on his lap. He said that someone came around the back of the car, opened the door, sprayed Mace inside, grabbed the bag, and ran. He said that he did not see the man but later learned it was Delmiccio Tigg. He said that the defendant gave him the defendant's 9mm pistol, that he went to an apartment, and that he found Tigg in bed and pretending to be asleep. He said that he confronted Tigg and took back the bag of cocaine but that some of the cocaine was missing. He said that Detective Goodwin later questioned him about the robbery and that he told Detective Goodwin the defendant gave him the gun. On cross-examination, Nelson testified that he used to be a drug dealer but that he always tried to tell the truth. He said that the defendant wanted the 9mm pistol back but that he would not give it to the defendant.

Officer Tracy Mansfield of the Murfreesboro Police Department testified that on July 30, 2000, he heard a request over his police radio for police to stop a maroon Chevrolet Astro van. He said that he saw the van, stopped it, and that the defendant and Tigg were inside. He said that a shotgun also was in the van and that he gave the gun to Officer Jason Higgens.

Detective Dan Goodwin of the Rutherford County Sheriff's Department testified that he was dispatched to Mr. Lopez's home on July 26 and investigated the robbery. He said that according to witnesses, five men wearing gloves and dark clothing came into the house. The men were carrying

guns and took two wallets, one from Angel Lopez-Moralez and one from Joaquin Martinez-Abacian. He said that an officer found Mr. Martinez-Abacian's wallet in the front bedroom, that the wallet appeared to have been dropped during the robbery, and that no money was missing from it. He said that an officer also found Mr. Lopez-Moralez's wallet. He said that the door to the home had been kicked open and that a large bloodstain was on the living room couch. He said that he interviewed Delmiccio Tigg on July 30 and August 2, 2000. He said that during Tigg's first interview, Tigg stated that Cordell Nelson participated in the robbery and shot Mr. Lopez. He said that during the second interview, Tigg stated that Nelson was not present and that the defendant used the pistol during the crimes. He said that he also interviewed Michael May and that at first, May denied knowing anything about the robbery. He said that May later admitted being at the robbery and carrying the shotgun.

Detective Goodwin testified that he interviewed the defendant on July 31 and that the defendant told him the following: The defendant loaned May a shotgun, and May drove a blue car to Mr. Lopez's house while the defendant followed in the Astro van. The defendant pointed out Mr. Lopez's house to May, and the defendant saw May, Tigg, and the two Hispanic men run inside the home. The defendant heard the men yelling about "deniro," and the two Hispanic men came out of the house carrying a stereo and other items. Detective Goodwin testified that the defendant told him he could find the 9mm pistol in an apartment at the Greystone Apartment complex. He said that after he recovered the weapon from that apartment, he interviewed Cordell Nelson and Nelson admitted leaving the pistol there. He said the police found a bullet in the mattress in Mr. Lopez's bedroom and a shell casing. He said he sent both to the Tennessee Bureau of Investigation (TBI) for testing. He acknowledged that at the defendant's preliminary hearing, Mr. Lopez identified May as the shooter. He said, though, that May and the defendant were about the same height and build. He also said that at the time of the robbery, the defendant's hair was longer than May's hair but that at the preliminary hearing, the defendant's hair was shorter than May's hair.

On cross-examination, Detective Goodwin testified that May's and the defendant's facial features did not change from the time of the robbery to the preliminary hearing. He acknowledged that at the preliminary hearing, Mr. Lopez testified that he could see the shooter's facial features through the pantyhose.

Dinnah Caluag from the TBI firearms investigation laboratory testified that she received live rounds, a shell casing from a spent bullet, a bullet, and a 9mm pistol for testing. She said she examined the pistol, test fired it, and compared the test bullet to the bullet and shell casing found at the crime scene. She concluded that the bullet and the casing came from the pistol. On cross-examination, she acknowledged that the gun had to be hand-loaded but that she did not test any of the live rounds for fingerprints. She said the TBI also was not asked to test the gun for fingerprints. The jury convicted the defendant of especially aggravated robbery and aggravated burglary against Mr. Lopez and aggravated assault against Angel Lopez-Moralez.

I. SUFFICIENCY OF THE EVIDENCE

The defendant claims that the evidence is insufficient to support his convictions. Regarding his especially aggravated robbery conviction, he contends that the evidence is insufficient because the proof did not show that he took any property from Mr. Lopez or that Mr. Lopez suffered serious bodily injury. Regarding all of his convictions, he claims that the evidence is insufficient because May and Tigg exaggerated his role, if any, in the crimes and were biased against him. The state claims that the evidence is sufficient. We agree with the state.

Our standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). We do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions about witness credibility were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

Especially aggravated robbery is defined as robbery that is "(1) [a]ccomplished with a deadly weapon; and (2) [w]here the victim suffers serious bodily injury." T.C.A. § 39-13-403(a). Robbery is "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." T.C.A. § 39-13-401. A person is guilty of theft if that person, with the intent to deprive the owner of property, knowingly obtains or exercises control over the property without the owner's effective consent. T.C.A. § 39-14-103. "Serious bodily injury" is defined as "bodily injury which involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." T.C.A. § 39-11-106(a)(34).

The defendant claims that the evidence is insufficient to support his especially aggravated robbery conviction because the state failed to prove a "taking" occurred in this case. Specifically, he contends that a taking was not established because the evidence did not show that the intruders removed any property from Mr. Lopez's person or presence or that Mr. Lopez owned the property. In support of his claim, he notes that although a stereo and CD were taken from another bedroom, this bedroom was occupied by other family members and no proof established "whatsoever that property taken from other family members' separate living quarters constituted property of Pascual Lopez, thereby giving him some type of constructive possession of said property." The state only contends that it was not required to prove that Mr. Lopez owned the stolen property in order for the evidence to be sufficient to support the conviction.

In a robbery case, it is "well settled that the taking from the person may be either actual or constructive." State v. Miller, 608 S.W.2d 158, 160 (Tenn. Crim. App. 1980). A taking is actual when it "is immediately from the person" and constructive "when in the possession of the victim or in the victim's presence." Id. This court has held that a victim may constructively possess property

even when the property is in another room. See State v. Edwards, 868 S.W.2d 682, 700 (Tenn. Crim. App. 1993) (although the victim was raped in her bedroom and bathroom, she constructively possessed the wallet that the defendant took from her living room); see also State v. John David Palmer, No. W1999-01310-CCA-R3-CD, Gibson County, slip op. at 7 (Tenn. Crim. App. Feb. 7, 2001), app. denied (Tenn. June 18, 2001) (stating that "theft of property located in essentially the same building as the victim is located, is sufficient to be 'from the person' of the victim" for the purpose of proving robbery).

"'Owner' means a person, other than the defendant, who has possession of or any interest . . . in property, even though that possession or interest is unlawful." T.C.A. § 39-11-106(a)(26). "[E]vidence of possession is ordinarily sufficient proof of ownership; and this is true although the one in possession may have held the property as bailee, trustee, or otherwise having only a special interest, and not a general ownership of the property." Jones v. State, 166 Tenn. 102, 102, 59 S.W.2d 501, 501 (1933). In determining whether a defendant has been in possession of drugs or stolen property, this court has held that "possession means control." See Peters v. State, 521 S.W.2d 233, 235 (Tenn. Crim. App. 1974). Other jurisdictions have held that "possession" can be established simply by showing that the victim has a greater right to the property than the defendant. See State v. McColl, 813 A.2d 107, 127 (Conn. Ct. App. 2003); State v. Coburn, 556 P.2d 382, 387 (Kan. 1976); State v. Cutwright, 626 So. 2d 780, 784 (La. Ct. App. 1993); State v. White, 702 A.2d 1263, 1270 (Mary. App. 1997); People v. Needham, 155 N.W.2d 267, 270 (Mich. Ct. App. 1967); Gray v. State, 797 S.W.2d 157, 161 (Tx. Ct. App. 1990); see also State v. John Wayne Singleton, No. 1, Decatur County (Tenn. Crim. App. Sept. 2, 1987), app. denied (Tenn. Nov. 16, 1987) (noting in an armed robbery case that the cashier had a right of possession "superior" to that of the defendant).

In the present case, the state asked Mr. Lopez during direct examination if men came to "your house uninvited," and Mr. Lopez answered, "Yes." The state then continued to question Mr. Lopez about what happened in "your house." During the defense's cross-examination of Angel Lopez-Moralez, it referred to "your uncle's house" and at no time during any testimony did it challenge the inference that the house in question belonged to Mr. Lopez. Taken in the light most favorable to the state, a rational jury could conclude that Mr. Lopez had control of the house from which the defendant and his codefendants took the stereo and CD. Although Mr. Lopez was not present in the bedroom when the items were taken, case law demonstrates that he still constructively possessed them. Moreover, despite the fact that Mr. Lopez was not the owner of the items, he obviously had a greater right to their possession than the defendant. Thus, the evidence is sufficient to show a "taking" from the person of Mr. Lopez.

As to the defendant's claim that the state failed to show that Mr. Lopez suffered serious bodily injury, Mr. Lopez acknowledged at trial that he was in "a great deal of pain." He testified that the pain lasted about three and one-half months and that he could not walk due to the gunshot for three months. Although no medical personnel testified about his injuries, the state introduced Mr. Lopez's hospital records into evidence. According to the records, a doctor treated Mr. Lopez for a four-centimeter scalp laceration and a gunshot wound that entered and exited his left thigh. The

records show that Mr. Lopez complained of "much pain" in his left leg and that he received intravenous pain medication. He spent two days in the hospital, received a Lortab prescription for the pain, and was left with a scar on his leg.

In his brief, the defendant cites State v. Sims, 909 S.W.2d 46, 49 (Tenn. Crim. App. 1995), in which this court applied the ejusdem generis doctrine of statutory construction to explain that the "extreme physical pain" definition of serious bodily injury must be read as applying to the same class of injury as those causing a substantial risk of death, protracted unconsciousness, protracted or obvious disfigurement, or the protracted loss or substantial impairment of a bodily member, organ, or mental faculty. Id. at 50. The victim in Sims suffered a broken nose and a bruised cheekbone as the result of being hit in the face with a gun by the defendant during a robbery. Id. at 48. After observing that the victim had been given anti-anxiety medication but that no pain medication had been prescribed, this court concluded that the "pain commonly associated with a broken nose" was not "extreme enough to be in the same class as an injury" involving the other elements of the serious bodily injury definition. Id. at 49. Because the proof did not show the type of extreme physical pain required for serious bodily injury, the defendant's conviction was modified from especially aggravated robbery to aggravated robbery. Id. at 50. Unlike the victim in Sims, Mr. Lopez suffered a gunshot wound that entered and exited his left thigh and required the use of pain medicine. Taken in the light most favorable to the state, we conclude that a rational jury could have found that Mr. Lopez suffered extreme physical pain sufficient to establish serious bodily injury.

As to the defendant's claim that the evidence is insufficient to support all of his convictions because his codefendants exaggerated his role in the crimes and were biased against him, the jury obviously accredited their testimony, as is its prerogative. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983) (holding that "[a] jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory"). The evidence is sufficient to support the defendant's convictions for especially aggravated robbery, aggravated burglary, and aggravated assault.

II. OTHER BAD ACTS

The defendant claims that the trial court erred by allowing the jury to hear about his other bad acts because such evidence was inadmissible pursuant to Rule 404(b), Tenn. R. Evid. He contends that even if the evidence fell under one of the rule's exceptions, it still was inadmissible because the trial court failed to follow Rule 404(b)'s mandatory procedural requirements. The state claims that because the evidence was not introduced for the purpose of showing the defendant's character, Rule 404(b) was not implicated. Moreover, the state argues that the trial court properly instructed the jury as to the evidence's limited purpose. We conclude that the trial court erred by allowing the jury to hear about the defendant's bad acts. However, we hold that the error was harmless.

During the state's opening remarks, the prosecutor tried to explain to the jury how Cordell Nelson ended up with the 9mm pistol that the defendant used during the robbery. The prosecutor stated as follows:

> And then Mr. Tigg is going to tell you what happened. Mr. Bush and Mr. Tigg got together, and they say that [Cordell Nelson] has got some drugs, and they want the drugs because they know they can take that and sell it. An ounce of cocaine is worth several thousand dollars.
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> So there's a plan hatched between Tigg and Bush four days after the robbery, and the plan is that Tigg will change his clothes. He puts on a mask, and he takes a can of Mace. And he runs up to this car that Nelson is in. Nelson is a passenger in the car. There are four people in that car. And he sprays all of them with this Mace, and they can't see Tigg.
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> . . . .
>
> Well, Bush comes over. He's been dealing with Nelson, and Bush becomes Nelson's friend and says let's go get those so and so's. This shouldn't be happening to you. You're my man. You're my buddy, and I'm going to help you get them. And Mr. Bush- -

At that point, the defense objected on the basis that the state was telling the jury about the defendant's being involved in a drug deal and other bad acts. The defense also requested a mistrial. The state told the trial court that it was explaining to the jury how the defendant transferred the 9mm pistol to Nelson four days after the robbery. The prosecutor then said, "Judge we probably ought to just have a 404(b) hearing and establish the parameters of this." However, the trial court ruled that the state could "tie in the gun" and instructed the jurors that the prosecutor was telling them only what he intended to prove during the trial. The prosecutor then continued his remarks as follows:

> So Mr. Nelson has had some drugs taken by Mr. Tigg. Mr. Bush comes out and befriends Mr. Nelson. Now, this will be Mr. Nelson who will be testifying on these points. Mr. Nelson is given a 9mm. pistol by Mr. Bush. That's the relevance of what happened four days after the fact. Bush gives a pistol to Nelson.

During Delmiccio Tigg's testimony, the state began questioning him about taking Nelson's drugs four days after the robbery. Tigg testified that Nelson was sitting in a car, that he sprayed Nelson with Mace, that he grabbed Nelson's bag of cocaine, that he ran into the defendant's apartment, and that he took about an ounce of cocaine out of the bag. The state then asked him, "Whose idea was it for you to do that?" and Tigg replied, "Rafael Bush." A short time later, the defense attorney objected on the basis that the state was introducing evidence of the defendant's other bad acts. The state explained to the trial court that it was "going to show where the pistol went." The trial court told the state to continue, and Tigg testified that Nelson confronted him with the defendant's gun, demanded that Tigg return the bag of drugs, and refused to return the 9mm pistol to the defendant. The defense again objected and stated:

> Judge, at this time I respectfully move for a mistrial based upon Gen. Price's questions to this witness about specific instances of bad conduct, which I didn't have any notice except what we talked about earlier today and that we should have a jury out hearing.
>
> Because now what he has done is that he has put - - and we talked about this during opening arguments. He has argued through this witness and presented testimony through this witness that after this event occurred, my client orchestrated some type of theft of drugs from Mr. Nelson through this individual. And then my client organized or orchestrated some type of assault by Mr. Nelson back against Mr. Tigg.
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> Judge, those are specific instances of conduct that they are trying to use to impeach my client's character. And he hasn't testified, and his character is not at issue. And they've gone about it all the wrong way. And those bells have been rung, and that's what I've been fussing about all day.

The state informed the trial court that it was "showing how the gun passed and why it passed from one person to the other." The state said that the trial court could have a 404(b) hearing and decide "what the proper remedy would be if there was a mistake made." The trial court overruled the defense's motion.

On the morning of the second day of trial, the defense again motioned that the trial court exclude from evidence any further reference to the defendant's other bad acts. The state told the trial court that the jury had to hear about Tigg's stealing Nelson's drugs in order for the state to explain how Nelson got the defendant's gun after the robbery. The state said that Nelson also would be testifying as to the events but that "I'm going to limit Mr. Nelson's conversation about these individuals to those specific situations . . . where the gun in the context of stealing some drugs was passed from Antonio Bush to Cordell Nelson. And that's going to be it." The trial court ruled that the state "can tie in the gun" but that the state could not ask witnesses about any bad acts. Later that day, Cordell Nelson testified that a few days after the robbery, Tigg stole his bag of drugs and the defendant gave him a 9mm pistol.

The defendant claims that the trial court erred by not holding a 404(b) hearing after the state acknowledged during opening remarks that one should be held. In addition, he claims that the trial court erred by allowing the state to introduce "character proof of drug transactions and an aggravated assault." He contends that the jury's hearing about those other bad acts denied him the right to a fair trial.

Rule 404(b), Tenn. R. Evid, prohibits the introduction of evidence of other crimes or acts, except when the evidence of other acts is relevant to a litigated issue, such as identity, intent, or motive, and its probative value is not outweighed by the danger of unfair prejudice. The rule states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
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> (1) The court upon request must hold a hearing outside the jury's presence;
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> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
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> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
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> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

"Where the evidence of other crimes, wrongs, and acts may reflect upon the character of the accused, the procedure set forth in Rule 404(b) should be followed . . . ." State v. Dubose, 953 S.W.2d 649, 655 (Tenn. 1997) (emphasis added). When a trial court substantially complies with the procedural requirements of the rule, its determination will not be overturned absent an abuse of discretion. Id. at 652. "However, in view of the strict procedural requirements of Rule 404(b), the decision of the trial court should be afforded no deference unless there has been substantial compliance with the procedural requirements of the Rule." Id.

During the state's opening remarks, it described how the defendant and Tigg came up with a plan to steal Cordell Nelson's drugs, keep some of the drugs, and sell them. The state also explained that, as part of the plan, Tigg robbed Nelson and the defendant gave Nelson the 9mm pistol. The defense objected and asked for a 404(b) hearing. Although the state agreed that the trial court should have a hearing, the trial court determined that it was unnecessary. However, given that the state had just described other bad acts committed by the defendant and that it intended to prove these acts during the trial, we agree with the defendant that the trial court should have held a 404(b) hearing to determine the admissibility of the evidence.

Moreover, we conclude that the other bad act evidence was inadmissible and, therefore, that the trial court erred by allowing the jury to hear about the defendant's other bad acts during the state's opening remarks and Tigg's testimony. The fact that the defendant and Tigg concocted a plan to assault and steal drugs from Nelson and then have Nelson assault Tigg with the gun was irrelevant to the earlier robbery. Moreover, although the state argued to the trial court that it was trying to show how the gun passed from the defendant to Nelson, it was not necessary for the state to mention

or have Tigg testify about the defendant's other bad acts in order to show that the defendant gave Nelson the pistol. To the contrary, Tigg simply could have testified that four days after the robbery, the defendant gave Nelson the gun and Nelson refused to return it to the defendant.

In any event, although the trial court erred by refusing to hold a 404(b) hearing and by allowing the jury to hear about the defendant's other acts, we conclude that the error was harmless. Tigg and May testified that the defendant participated in the robbery and shot the victim. Detective Goodwin testified that he interviewed the defendant and that the defendant admitted participating in the robbery. Given the evidence against the defendant, we do not believe that the jury's hearing about the defendant's other bad acts more probably than not affected the result of the trial. See T.R.A.P. 36(a); Tenn. R. Crim. P. 52(a).

III. CROSS-EXAMINATION OF DETECTIVE GOODWIN

The defendant claims that the trial court erred by limiting his cross-examination of Detective Goodwin regarding Mr. Lopez's identifying Michael May as the shooter at May's and the defendant's preliminary hearing. The state claims that the trial court properly limited the testimony. We conclude that the defendant is not entitled to relief.

On direct examination, Detective Goodwin acknowledged that at the defendant's and Mr. May's preliminary hearing, Mr. Lopez identified May as the shooter. He also testified that May and the defendant had similar heights, builds, and complexions and that they had "reversed their hair styles" by the time of the preliminary hearing. On cross-examination, Detective Goodwin acknowledged that at the hearing, Mr. Lopez testified that he could see the shooter's facial features through the nylon pantyhose and that he did not take his eyes off the shooter. The defense then asked Detective Goodwin, "Do you recall that certainty from Mr. Lopez in his identification at the preliminary hearing?" The state objected on the grounds that the defendant was asking the detective improperly to "characterize the certainty in another witness's testimony." The trial court sustained the objection. The defense continued its cross-examination and attempted to read Mr. Lopez's preliminary hearing testimony to Detective Goodwin. The state again objected, and the following exchange occurred in front of the jury:

> [The State]: He can't use the testimony of another witness to impeach him.
>
> THE COURT: I know he can't.
>
> [The State]: And we're not talking about a comparison in physical appearance, which is what the detective talked about. And to reiterate the testimony from a previous hearing, when this witness has been available to him, is not proper. He's asking him to comment on

	another witness's testimony, and that's my objection. You can't do that from another hearing.
[Defense]:	If it please the Court, Detective Goodwin was allowed to show these pictures and talk about the change in the hair. And I want to remind Detective Goodwin that Mr. Lopez talked about facial features and all those other things at that hearing.
. . . .	
THE COURT:	You've already got that before the jury. Let's don't belabor the point. In other words, let's don't go over all of Mr. Lopez's testimony to say that this is what he testified. If you want to call Mr. Lopez again, he's still in the courtroom.
[Defense]:	Yes, sir, I understand that, Judge. But the point of my cross-examination is to point out that it wasn't the hair that was the identifying issue. It was the structure and the shape of his face.
THE COURT:	You've got that before the jury.

The defendant claims that he was improperly restricted from asking Detective Goodwin about Mr. Lopez's identifying May as the shooter, May's and the defendant's different hairstyles, and Mr. Lopez's testimony regarding the two men's facial features.

The defendant's constitutional right to confront the witnesses against him includes the right to conduct meaningful cross-examination. Pennsylvania v. Ritchie, 480 U.S. 39, 51, 107 S. Ct. 989, 998 (1987); State v. Brown, 29 S.W.3d 427, 431 (Tenn. 2000); State v. Middlebrooks, 840 S.W.2d 317, 332 (Tenn. 1992). Denial of the defendant's right to effective cross-examination is "'constitutional error of the first magnitude'" and may violate the defendant's right to a fair trial. State v. Hill, 598 S.W.2d 815, 819 (Tenn. Crim. App. 1980) (quoting Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111 (1974)). "The propriety, scope, manner and control of the cross-examination of witnesses, however, rests within the discretion of the trial court." State v. Dishman, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995); Coffee v. State, 188 Tenn. 1, 4, 216 S.W.2d 702, 703 (1948). Furthermore, "a defendant's right to confrontation does not preclude a trial court from imposing limits upon cross-examination which take into account such factors as

harassment, prejudice, issue confusion, witness safety, or merely repetitive or marginally relevant interrogation." State v. Reid, 882 S.W.2d 423, 430 (Tenn. Crim. App. 1994). This court will not disturb the limits that a trial court has placed upon cross-examination unless the court has unreasonably restricted the right. Dishman, 915 S.W.2d at 463; State v. Fowler, 213 Tenn. 239, 253, 373 S.W.2d 460, 466 (1963).

The defendant claims that he was improperly restricted from asking the detective about Mr. Lopez's identifying May as the shooter at the preliminary hearing, about differences between the defendant's and May's hairstyles, and about Mr. Lopez's testimony regarding the men's facial features. However, we note that the detective testified on cross-examination that Mr. Lopez testified at the hearing that he could see the shooter's features and that Mr. Lopez claimed he did not take his eyes off the shooter from the time the shooter came into the bedroom. Thus, the defense was able to get before the jury that Mr. Lopez stared at the shooter during the robbery and identified a codefendant as the shooter at the preliminary hearing.

Ordinarily, one witness's opinion regarding the credibility of another witness's testimony is irrelevant and improper. See State v. Schimpf, 782 S.W.2d 186, 194 (Tenn. Crim. App. 1989) (stating that witness credibility "is a matter only for the jury"). In any event, Rule 103(a)(2), Tenn. R. Evid., provides that in order to reverse a trial court's ruling to exclude evidence, a substantial right of a party must be affected and, if not apparent from the context, "the substance of the evidence and the specific evidentiary basis supporting admission" must be made in an offer of proof. The defendant did not make an offer of proof as to Detective Goodwin's testimony, and we cannot speculate as to his proposed testimony or its purpose. We conclude that the trial court did not err.

IV. REDIRECT EXAMINATION OF DETECTIVE GOODWIN

The defendant argues that the trial court erred by allowing the state to ask Detective Goodwin questions during redirect examination that went beyond the scope of his cross-examination testimony. The state claims that the defense opened the door to the questioning and that, in any event, the defendant has failed to show that he was prejudiced by any error. We hold that the trial court properly allowed the state to question the detective.

During Detective Goodwin's direct testimony, he stated that he interviewed the defendant and that the defendant admitted loaning the shotgun to May, driving to Mr. Lopez's house, and being present at the robbery. He said the defendant also told him where to find the 9mm pistol. On cross-examination, the defense questioned the detective briefly about his interviews with May and Cordell Nelson. However, it did not question him about his interview with the defendant. On redirect, the state asked Detective Goodwin, "Mr. Bush told you that he furnished the shotgun, drove the car, and was present at the time of the robbery. Did you have any reason to question that?" At that point, the defense objected on the grounds that the question went beyond the scope of cross-examination because the defense had not questioned Detective Goodwin about the defendant's interview. The trial court overruled the objection, and the state asked the detective if the defendant ever retracted the statement in which he claimed that he gave the shotgun to May, drove to Mr. Lopez's house, and

watched the four other men go into the home. The detective testified that the defendant never retracted his statement.

The "scope of redirect examination, is within the discretion of the trial court, whose ruling will not be reversed absent an abuse of that discretion." State v. Chearis, 995 S.W.2d 641, 645 (Tenn. Crim. App. 1999). Although the Tennessee Rules of Evidence do not address the scope or manner of redirect examination of a witness, "Tennessee law is well-settled that redirect examination can broach topics raised on cross-examination even though those matters were not inquired into on direct examination." State v. Baker, 966 S.W.2d 429, 433 (Tenn. Crim. App. 1997). Moreover, a trial court "has discretion to permit the witness on redirect to testify about new facts that were not mentioned on direct or cross-examination." Neil P. Cohen et al., Tennessee Law of Evidence § 6.11[6][b] (4th ed. 2000).

The defendant argues that the state's questioning was improper because it went beyond the scope of the detective's cross-examination testimony. However, Detective Goodwin testified on direct examination that the defendant admitted giving May the gun, driving to Mr. Lopez's house, and being present at the robbery. On redirect, the state simply asked the detective if he had any reason to doubt the defendant's statement and if the defendant ever retracted the statement. This subject matter already had been broached on direct examination, and the trial court did not abuse its discretion by overruling the defendant's objection.

V. CROSS-EXAMINATION OF MICHAEL MAY

The defendant argues that the trial court erred by limiting his cross-examination of Michael May. He argues that the questioning was appropriate in order to show that May was biased against him. The state claims that the trial court properly limited the defendant's cross-examination of May. We hold that the trial court did not abuse its discretion.

During the defendant's cross-examination of May, the following exchange occurred:

> Q. You lied to [Detective Goodwin], didn't you?
>
> A. Yes, sir.
>
> . . . .
>
> Q. Did you tell Detective Goodwin in your statement to him some lies?
>
> A. Yes, I did.
>
> Q. So you lied some, and you told the truth some.

A. Yes. I lied about my involvement at first as far as being there with them. That's what I lied about. But as far as to who set the ordeal up as far as the robbery, I did not lie about that.

. . . .

Q. You wouldn't lie up here in front of this jury, would you?

A. No, sir, I wouldn't.

Q. Just to send Mr. Bush to prison?

At that point, the state objected on the basis that the question was argumentative, and the trial court sustained the objection. The defense's questioning of May continued as follows:

Q. Didn't [Detective Goodwin] tell you that Mr. Bush said you were the shooter?

A. Yes, sir, he said that.

. . . .

Q. And that made you mad at Mr. Bush, didn't it?

A. Yes, sir.

. . . .

Q. And you remember Detective Goodwin [told] you that he'd put in a good word to the DA and make a recommendation?

A. Yes, sir.

Q. If you would say that Mr. Bush was the shooter.

A. Yes, sir.

The defendant claims that the trial court erred by sustaining the state's objection. He contends that the question was proper in order to show May's lack of credibility and bias against him.

As previously stated, the propriety, scope, manner, and control of cross-examination of witnesses rests within the sound discretion of the trial court. Coffee, 188 Tenn. at 4, 216 S.W.2d at 703; Dishman, 915 S.W.2d at 463. The scope of cross-examination extends to "any matter relevant

to any issue in the case, including credibility." Tenn. R. Evid. 611(b). Moreover, a party "may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." Tenn. R. Evid. 616.

We hold that the trial court erred by sustaining the state's objection. The defense attorney's asking May if he would lie in order to send the defendant to prison did not require May to derive an inference or a conclusion and, therefore, was not argumentative. Nevertheless, the defendant is not entitled to relief. During cross-examination, the defense established that May lied during his initial interviews with Detective Goodwin and that May was angry with the defendant because the defendant had accused May of shooting Mr. Lopez. Thus, the defense was able to get before the jury that May lacked credibility and was biased against the defendant. The trial court's error was harmless. See T.R.A.P. 36(a)

VI. STATE'S UNDISCLOSED WITNESS

The defendant contends that the trial court erred by allowing the state to call a witness to testify when the witness was not on the state's witness list and her testimony was irrelevant. The state claims that the trial court properly ruled the witness could testify. We agree with the state.

During Delmiccio Tigg's and Michael May's cross-examination testimony, the defense attempted to impeach them by asking if their cases had been set for trial and why they were not being tried with the defendant. Tigg testified that although he was originally indicted with the defendant, his case had not been set for trial. He also testified that he had talked with the prosecutor about a possible plea agreement in return for his testifying against the defendant. May testified that he had been indicted with the defendant and that he was going to plead guilty. On the second day of trial, the state announced that it was going to call the Rutherford County Criminal Court Deputy Clerk to testify that Tigg's and May's trials had been scheduled to start the same day as the defendant's trial in order to show that their cases were "on track" and "not just floundering around somewhere." The defense objected on the grounds that the clerk had not been included on the state's witness list. The trial court determined that the defense should not have been surprised that the state would want to call the clerk and that the clerk could testify because "the State has a right to show that the cases were set." Deputy Clerk Gina Gammon testified that Tigg's and May's trials had been set to begin the same day as the defendant's trial.

The defendant claims that the trial court erred by allowing Ms. Gammon to testify because she was not included on the state's witness list. In addition, he contends that her testimony was irrelevant because Tigg and May may not have known that their trials had been scheduled to start on the same day as the defendant's trial. The state claims that the trial court properly allowed the clerk to testify because Tigg's and May's testimony "left the impression with the jury that no trial date had been set pending the outcome in this case."

Pursuant to T.C.A. § 40-17-106, the district attorney general is to list upon the indictment the names of witnesses expected to be called at trial. However, this duty is directory only. State v.

Baker, 751 S.W.2d 154, 164 (Tenn. Crim. App. 1987); State v. Underwood, 669 S.W.2d 700, 703 (Tenn. Crim. App. 1984). Accordingly, failure to include a name on the list does not necessarily disqualify that witness from testifying. State v. Street, 768 S.W.2d 703, 711 (Tenn. Crim. App. 1988). However, the statute is intended to prevent surprise to a defendant and to ensure that the defendant will not be handicapped in defense preparation. State v. Morris, 750 S.W.2d 746, 749 (Tenn. Crim. App. 1987). A defendant will be entitled to relief for nondisclosure if he or she can demonstrate prejudice, bad faith, or undue advantage. State v. Harris, 839 S.W.2d 54, 69 (Tenn. 1992); State v. Kendricks, 947 S.W.2d 875, 883 (Tenn. Crim. App. 1996). The decision to allow a witness to testify is discretionary with the trial court. Id.

The state wanted Ms. Gammon to testify because the defense had questioned Tigg and May about their cases. The trial court ruled that Ms. Gammon could testify because the defense had implied to the jury that May's and Tigg's cases had not been set for trial and in order not "to leave a wrong impression to the jury." Regarding whether May and Tigg knew that their cases had been set for trial, the trial court ruled that the parties could call May's and Tigg's attorneys to testify in order to resolve that question. However, neither party called the attorneys to testify. The defendant has not demonstrated prejudice, bad faith, or undue advantage, and we cannot conclude that the trial court abused its discretion by allowing Ms. Gammon to testify.

VII. DISMISSAL OF ATTEMPTED FIRST DEGREE MURDER CHARGE

Next, the defendant contends that the trial court erred by telling the jury that the state had dropped an attempted first degree murder charge against him. He contends, with no legal argument, that "[by] making this statement, the Trial Judge gave credibility to the State's case." The state argues that although the trial court's statement was incorrect, the misstatement does not constitute reversible error. We agree with the state.

The defendant was indicted for attempted first degree murder, especially aggravated robbery, especially aggravated burglary, and two counts of aggravated assault. However, at some point, the state entered a nolle prosequi on the attempted first degree murder charge. During the jury charge, the trial court stated the following:

> The indictment in this case is a formal written accusation charging the defendant with a crime. It is not evidence against the defendant and does not create any inference of guilt. Now, the State has told you that they have determined not to prosecute on attempted first degree murder because they didn't feel like the proof showed that it was attempted first degree murder, that was charged in the first count and that will not be a part of your deliberation.

At the hearing on the motion for new trial, the defendant argued that the state never made any comments to the jury regarding the dismissal of the attempted murder charge and that the trial court erred by making this statement to the jury. The trial court stated that while it "may have misspoke

about that," the error did not warrant a new trial. The defendant contends that the trial court's statement deprived him of the right to a fair trial.

The Tennessee Constitution prohibits judges from commenting on the evidence in a case. Tenn. Const. art. VI, § 9. A trial judge is obligated to "be very careful not to give the jury any impression as to his feelings or to make any statement which might reflect upon the weight or credibility of evidence or which might sway the jury." State v. Suttles, 767 S.W.2d 403, 407 (Tenn. 1989). We note that the defendant did not object to the trial court's statement and did not request a jury instruction to negate any impression the trial court's statement might have made on the state's case. Such failures constitute a waiver of this issue on appeal. Kelly v. State, 477 S.W.2d 768, 770 (Tenn. Crim. App. 1972); T.R.A.P 36(a). In this respect, the defendant has failed to show that the trial court's statement constitutes plain error. See Tenn. R. Crim. P. 52(b).

VIII. OFFENSES COMMITTED BEFORE INDICTMENT

The defendant claims that he is entitled to a new trial because the state failed to prove that the offenses were committed before he was indicted for the crimes as required by T.C.A. § 39-11-201(a)(4). In support of his claim, he cites State v. Brown, 53 S.W.3d 264 (Tenn. Crim. App. 2000), app. denied (Tenn. 2001), in which this court reversed a defendant's convictions for first degree murder and abuse of a corpse because the state failed to prove that the defendant committed the crimes before he was formally charged with the offenses. The state claims that sufficient proof exists to show that the crimes were committed before the defendant was indicted. We agree with the state.

T.C.A. § 39-11-201(a)(4) provides that it is the state's burden of proof in criminal cases to prove beyond a reasonable doubt that the "offense was committed prior to the return of the formal charge." In Brown, this court stated the following regarding this requirement:

> Granted, this is an easy matter to prove. . . . [The] reading of the indictment to the jury, coupled with evidence of when the offense was committed, would establish that the offense was committed prior to the return of the indictment. Also, the State could merely ask an appropriate witness whether the actions of the defendant constituting the offense occurred before the defendant was charged with that offense. This would satisfy the requirements of the statute as well.

Id. at 279. Despite the fact that it was "obvious" the crimes were committed before the state indicted the defendant, this court reversed his convictions because there was "no evidence that the indictment was ever read to the jury or shown to the jury, and no witness was asked whether the offense occurred prior to the return of the indictment." Id. at 279-280.

Before opening statements began in the present case, the state waived the reading of the indictments. However, during the jury instructions, the trial court informed the jury that the defendant had been indicted by the grand jury during the February 2001 session of the Rutherford

County Criminal Court and then read the charges from the indictments to the jury. During the trial, Mr. Lopez and Detective Goodwin testified that the crimes occurred on July 26, 2000. Thus, we conclude that the evidence sufficiently shows that the crimes were committed before the return of the indictments.

IX. INSTRUCTION ON ATTEMPTS

The defendant contends that the trial court erred by refusing to charge attempted especially aggravated robbery and attempted robbery as lesser included offenses of especially aggravated robbery; attempted aggravated burglary and attempted burglary as lesser included offenses of aggravated burglary; and attempted aggravated assault and attempted assault as lesser included offenses of aggravated assault. The state claims that any instructions on attempt to commit the offenses were not warranted in this case because the defendant completed the crimes and no evidence exists to support mere attempts. We agree with the state.

Our supreme court has held that an offense is a lesser included offense if:

> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
>
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
>
> > (1) a different mental state indicating a lesser kind of culpability; and/or
> >
> > (2) a less serious harm or risk of harm to the same person, property or public interest; or
>
> (c) it consists of
>
> > (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> >
> > (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> >
> > (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

State v. Burns, 6 S.W.3d 453, 466-67 (Tenn. 1999). If an offense is a lesser included offense, then the trial court must conduct the following two-step analysis in order to determine whether the lesser included offense instruction should be given:

> First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser-included offense. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser-included offense.

Id. at 469. "As a general rule, evidence sufficient to warrant an instruction on the greater offense also will support an instruction on a lesser offense under part (a) of the Burns test." State v. Allen, 69 S.W.3d 181, 188 (Tenn. 2002).

If a trial court improperly omits a lesser included offense instruction, then constitutional harmless error analysis applies and this court must determine if, beyond a reasonable doubt, the error did not affect the outcome of the trial. State v. Ely, 48 S.W.3d 710, 725 (Tenn. 2001). "In making this determination, a reviewing court should conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury." Allen, 69 S.W.3d at191. Because attempt crimes are lesser included offenses under part (c) of the Burns test, we must determine whether the evidence in this case would support convictions for attempted especially aggravated robbery, attempted aggravated burglary, and attempted aggravated assault by use or display of a deadly weapon.

As stated previously, especially aggravated robbery is defined as robbery that is "(1) [a]ccomplished with a deadly weapon; and (2) [w]here the victim suffers serious bodily injury." T.C.A. § 39-13-403(a). Robbery is "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." T.C.A. § 39-13-401. A person is guilty of theft if that person, with the intent to deprive the owner of property, knowingly obtains or exercises control over the property without the owner's effective consent. T.C.A. § 39-14-103. A person is guilty of the offense of aggravated burglary if he or she enters a habitation without the effective consent of the owner with the intent to commit a theft. T.C.A. §§ 39-14-402, -403. Aggravated assault as charged in the indictment occurs when the defendant intentionally, knowingly, or recklessly causes another reasonably to fear imminent bodily injury while using or displaying a deadly weapon. See T.C.A. §§ 39-13-101(a)(2), -102(a)(1)(B).

A person commits attempt who, acting with the kind of culpability otherwise required for the offense:

> (1) Intentionally engages an action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

T.C.A. § 39-12-101(a). In State v. Marcum, 109 S.W.3d 300 (Tenn. 2003), our supreme court held that unless the evidence viewed in the light most favorable to the defense supports an instruction on attempt, an attempt instruction is not warranted.

In this case, the evidence shows that on the night of July 26, 2000, the defendant, Tigg, and May planned to rob Pascual Lopez-Blacos. The three of them drove with two Hispanic men to Mr. Lopez's house, and the defendant kicked in the door to the home. The defendant and Tigg went into Mr. Lopez's bedroom, demanded money, and shot him in the knee. A man with a gun also went into Angel Lopez-Morales's bedroom, hit him in the head, and took his wallet. The two Hispanic men removed a stereo and a CD from a third bedroom. We conclude that this evidence shows the defendant committed the crimes of especially aggravated robbery and aggravated burglary against Pascual Lopez-Blacos and aggravated assault against Angel Lopez-Moralez. There is no hint of evidence that the defendant merely attempted to commit the crimes and, therefore, no attempt instructions were warranted.

X. EXCESSIVE SENTENCE

The defendant contends that his twenty-two-year sentence for especially aggravated robbery is excessive. He claims that based upon May's and Tigg's participation and involvement in the crimes, the trial court should have sentenced him to no more than twenty years in confinement for the robbery. The state claims that the trial court properly enhanced the defendant's sentence. We agree with the state.

At the defendant's sentencing hearing, the defendant read a statement that he had written. In the statement, the defendant asked for mercy. He said that he had been incarcerated in jail for the past eighteen months and that he had had time to reflect on his life during that time. He said that he had chosen the wrong friends and that he did not rob, burglarize, or assault anyone. He said his trial attorney had been more interested in him pleading guilty than in proving his innocence. He said he had refused to plead guilty because he had not committed the crimes. He asked that the trial court

grant him an alternative sentence and order rehabilitation for his drug and alcohol abuse. He said that even though he did not commit the crimes, he was sorry for what Mr. Lopez and his family had been through.

After the defendant read his statement, the state asked to cross-examine him. The defendant's attorney told the trial court that the defendant had taken the stand only to read the statement. The prosecutor told the trial court, "He is either a witness or there is no reason for him to get up there." The trial court agreed with the state. On cross-examination, the defendant testified that he was innocent. The state then attempted to question him about the crimes, and the defendant asserted his Fifth Amendment privilege against self-incrimination. The following exchange then occurred:

> [The State]: Then I would ask that these claims that he's made be struck, because that is a comment on the evidence that he's now making without the benefit of cross examination. And I would ask that that statement be --
>
> THE COURT: He is asking the Court for a suspended sentence. Of course, the Court is -- by law cannot give him a suspended sentence. So, there is nothing I can do about that.
>
> [The State]: I am not concerned about his plea for probation. What I am saying is that I would ask that the Court strikes any reference to his innocence since we have been denied the opportunity to cross examine him on that.
>
> THE COURT: All right. That will be stricken then.

The defendant went on to state on cross-examination that he had been pleased with his attorney's performance until closing arguments and that his attorney should have objected several times during the state's closing argument.

According to the defendant's presentence report, the then twenty-four-year-old defendant dropped out of high school but received a certificate in auto body mechanics. He stated that his physical health was fair, that he suffered from sleep apnea and asthma, and that he had to use an inhaler. He said that his mental health was fair and that he tried to commit suicide in 1999. The defendant said that he began using alcohol when he was nine or ten years old and that he began using illegal drugs when he was eight. Although the defendant had not received any treatment for his drug or alcohol problems, he stated that he had attended Alcoholics Anonymous and Narcotics Anonymous while in jail.

In the report, the defendant stated that he had worked at Tandem Temporary Service, Red Cap, and Waldenbooks. However, the officer who prepared the report could not verify the defendant's employment at any of those companies. The report shows that the defendant's prior criminal record includes five convictions for driving on a revoked or suspended license, three convictions for resisting arrest, and convictions for cocaine possession, marijuana possession, trespassing, driving under the influence, and criminal impersonation. The report shows that the defendant received probation for some of his convictions and that his probation was revoked four times.

The trial court determined that enhancement factors (1), that the defendant has a history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; (2), that the defendant was a leader in the commission of the offense; (8), that the defendant "has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community"; and (22), that the defendant "intentionally selects the person against whom the crime is committed . . . in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry or gender of that person . . . ," applied to his sentences. See T.C.A. § 40-35-114(1), (2), (8), (22) (Supp. 2001) (amended 2002).[1] The trial court did not apply any mitigating factors and enhanced the defendant's presumptive twenty-year sentence for the especially aggravated robbery conviction to twenty-two years.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement

[1]The legislature's 2002 amendment to T.C.A. § 40-35-114 added as the new enhancement factor (1) that the "offense was an act of terrorism" but changed the existing enhancement factors only by increasing their designating number by one.

> factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Also, in conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

The range of punishment for a Range I defendant convicted of a Class A felony is fifteen to twenty-five years. T.C.A. § 40-35-112(a)(1). The sentence to be imposed for a Class A felony is presumptively the midpoint in the range unless there are enhancement factors present. T.C.A. § 40-35-210(c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(d), (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Commission Comments; Moss, 727 S.W.2d at 237; see Ashby, 823 S.W.2d at 169.

Initially, we must point out that the trial court and the state incorrectly concluded that the defendant had to testify if he wanted to address the court. Pursuant to T.C.A. § 40-35-210(b)(6), the trial court must consider "[a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing." We believe this allows the defendant the choice of addressing the trial court directly, as opposed to testifying under oath. See State v. Jerry Winfred Keathly, M2002-00568-CCA-R3-CD, DeKalb County (Tenn. Crim. App. May 21, 2003).

That said, we conclude that the defendant's twenty-two-year sentence for especially aggravated robbery is proper. The defendant does not argue that the trial court improperly applied enhancement factors or that it failed to consider applicable mitigating factors. Instead, he contends that he should have received no more than the presumptive sentence of twenty years because of his codefendants' involvement in the crimes. However, given that the trial court determined four enhancement factors applied in this case, we believe the trial court's enhancing the sentence from twenty to twenty-two years was justified.

XI. CUMULATIVE ERRORS

Finally, the defendant contends that the cumulative effect of errors deprived him of the right to a fair trial. Having found no substantial errors that would alter the outcome of the case, we view the issue to be without merit.

Based upon the foregoing and the record as a whole, we affirm the judgments of the trial court.

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JOSEPH M. TIPTON, JUDGE